


**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

FILED

FEB 27 2019

CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY  DEPUTY

**TEXAS LEAGUE OF UNITED LATIN
AMERICAN CITIZENS, ET AL.,**

Plaintiffs,

V.

**DAVID WHITLEY, in his Official Capacity
as Secretary of State for the State of Texas;
ET AL.,**

Defendants.

CIVIL ACTION NO. SA-19-CA-074-FB

ORDER

Before the Court are a number of preliminary issues related to protecting the integrity of the election process and ensuring the Equal Protection of the laws for all Texans. There is unanimity among the parties, counsel and the Court that non-American citizens are ineligible to vote.

The evidence has shown in a hearing before this Court that there is no widespread voter fraud. The challenge is how to ferret the infinitesimal needles out of the haystack of 15 million Texas voters. The Secretary of State through his dedicated employees, beginning in February 2018, made a good faith effort to transition from a passive process of finding ineligible voters through the jury selection system in each county to a proactive process using tens of thousands of Department of Public Safety driver license records matched with voter registration records. Notwithstanding good intentions, the road to a solution was inherently paved with flawed results, meaning perfectly legal naturalized Americans were burdened with what the Court finds to be ham-handed and threatening correspondence from the state which did not politely ask for information but rather exemplifies the power of government to strike fear and anxiety and to intimidate the least powerful among us.¹ See Attachment A (TX-LULAC

¹*Boustani v. Blackwell*, 460 F. Supp. 2d 822, 827 (N.D. Ohio 2006) (Boyko, J.) ("This Court has personally presided over numerous naturalization ceremonies and has witnessed firsthand the joy of these new Americans and their intense desire to participate in this nation's democratic process. There is no such thing as a second-class citizen

Exhibit 4). No native born Americans were subjected to such treatment. *See* U.S. CONST. amend XIV, § 1 (“[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”). Out of 98,000 new American voters on the list, thus far approximately 80 have been identified as being ineligible to vote.² Almost immediately upon sending the list, the government had an “oops” moment, realizing that 25,000 names should not have been included. It appears this is a solution looking for a problem. Indeed, Secretary of State Whitley has accepted responsibility and apologized for the failure to seek confirmation of the accuracy, appropriateness, competency and due diligence of the process before the rollout. Though promising more transparency, the Secretary has resisted plaintiffs’ legal concerns as opposed to entering into an agreed solution precluding further fear and intimidation. *See* Attachment B (TX-LULAC Exhibit 54); *see also United States v. Florida*, 870 F. Supp. 2d 1346, 1347, 1348 (N.D. Fla. 2012) (Hinkle, J.) (explaining that Florida election officials identified only “a small number” of ineligible voters from Secretary of State’s list of “180,000 registered voters who he said might be noncitizens”).³ The Florida program, similar in nature to Texas, was ultimately abandoned by the state. *Florida*, 870 F. Supp. 2d at 1350-51. Here, for the local officials responsible for implementing the program, it was not a Henry David Thoreau moment

or a second-class American. Frankly, without naturalized citizens, there would be no America. It is shameful to imagine that this statute is an example of how the State of Ohio says thank you to those who helped build this country.”). I concur. (Biery, J.).

²The Bard might say this is much ado about nothing. WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING*, act 3, sc.1. On the other hand, for the people who perceive discriminatory impact, it is much ado about their constitutionally protected rights.

³As plaintiffs’ counsel stated at the preliminary injunction hearing, “[o]n the Florida case, . . . they started at 180,000 identified voters in that state, and by the time they went through all the sifting, they ended up with 85” people who were ineligible to vote. (Docket no. 57, at page 52, lines 12-20); *see also Editor’s Note on Nov. 12, 2018 to Story Published in May 2012*, <https://www.nbcmiami.com/news/local> (last visited Feb. 26, 2019) (explaining that Florida election documents show that initial list of 180,000 names was whittled to only 85 ineligible voters).

("Simplify, simplify.")⁴ Rather, the Court heard compelling evidence concerning confusing and contradictory communications from the Secretary of State.

While the Court awaits proposed findings of fact and conclusions of law regarding the preliminary injunction issues, the Court is prepared to address some issues.

Defendants Whitley and Paxton have moved to dismiss, alleging the Court has no jurisdiction and plaintiffs have failed to state a claim. To the extent defendants rely upon state statutes in support of the jurisdictional motion, the Court holds that the United States Constitution trumps state law in appropriate circumstances, this being one. Moreover, given the highly credible evidence presented by plaintiffs, the Court finds overwhelmingly that claims for relief have been properly stated. Accordingly, defendants' motion to dismiss (docket no. 20) is DENIED.

Plaintiffs have also sued Attorney General Paxton, whose only involvement shown thus far is a press release, which the Court finds arguably vituperative in tone but nevertheless states the Attorney General's authority and, therefore, without further proof is within his First Amendment right to free speech. *See* Attachment C (TX-LULAC Exhibit 3). Clearly, this statement is not yelling fire in a crowded theater and therefore not subject to being censured.⁵ While the Court would prefer that political rhetoric be newtralized to more civil discourse, Article III of the Constitution bestows no power on the federal judiciary to make wishes come true. Accordingly, plaintiffs' request for relief regarding the press release is DENIED.

The Court awaits final advice from the individual counties which are parties concerning whether they will agree to pause the process, particularly not sending any notice of examination letters without

⁴HENRY D. THOREAU, WALDEN 91 (J. Lyndon Shanley ed., Princeton Univ. Press 1971) (1854).

⁵As Justice Oliver Wendell Holmes, Jr. stated in *Schenck v. United States*, 249 U.S. 47, 52 (1919): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

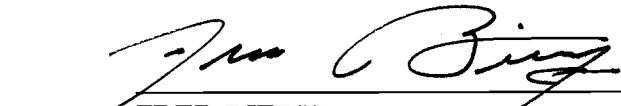
prior approval of the Court. Local officials can continue to find out if in fact someone is registered who is not a citizen, so long as it is done without communicating directly with any particular individual on the list. In addition, local officials are ORDERED not to remove any person from the current voter registration list until authorized by this Court. As to the first rollout of 98,000, the Secretary of State is ORDERED to tell other counties which are not parties to this litigation, or party counties which will not agree to a pause, not to send any notice of examination letters nor remove voters from registration without prior approval of the Court with a conclusive showing that the person is ineligible to vote.

With reference to the new lists being prepared based on contemporaneous applications for driver licenses and applications to register to vote, the Secretary of State may proceed with the monthly rollouts. However, the Secretary of State is affirmatively ORDERED to advise and direct local voting officials not to send notice of examination letters nor remove voters from registration without prior approval of the Court.

The Court further finds and concludes the Secretary of State, though perhaps unintentionally, created this mess. As Robert Fulghum taught in *All I Really Need to Know I Learned in Kindergarten*, "always put things back where we found them and clean[] up our own messes." ROBERT FULGHUM, *ALL I REALLY NEED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS* (Villard Books 1986).

IT IS SO ORDERED.

SIGNED this 22nd day of February, 2019.


FRED BIERY
UNITED STATES DISTRICT JUDGE

Prescribed by Secretary of State

Sections 16.033; 16.0332, Texas Election Code; Sections 521.044, 730.005, Texas Transportation Code; Section 62.114, Texas Government Code

BW1-12, 12/2018

NOTICE TO REGISTERED VOTER FOR PROOF OF CITIZENSHIP

Aviso solicitando comprobante de ciudadanía

My office has received information concerning your registration to vote. Your registration status is being investigated because there is reason to believe you may not be a United States citizen. This information may have been provided by clerks of the court regarding individuals who were excused or disqualified from jury duty because they are not U.S. citizens and/or the Department of Public Safety ("DPS") for individuals possessing a Driver License or Personal Identification Card who DPS has identified are not citizens of the United States and/or other information derived through lawful means. You are now required to confirm your eligibility for registration by providing proof of citizenship to maintain your registration status. Proof of citizenship must be in a certified form of birth certificate, passport, or citizenship papers. If you fail to provide this proof of citizenship within 30 days from the date of this letter, your voter registration will be cancelled.

Mi oficina ha recibido información en cuanto su inscripción electoral. Estamos investigando su elegibilidad para inscripción en base a que hay causa de dudar su ciudadanía estadounidense. Esta información podría venir bien sea de los oficinistas de la corte a través de la lista de personas disculpadas o descalificadas de prestar servicio como miembro de un jurado debido a que tales personas no son ciudadanos estadounidenses y/o del Departamento de Seguridad Pública ("DPS") en cuanto a personas en posesión de una licencia de conducir o tarjeta de identidad personal quienes DPS ha identificado como no-ciudadanos de los Estados Unidos y/u otra información derivada por medios legales. Ahora se requiere que usted confirme su elegibilidad para inscripción al proveer un comprobante de su ciudadanía para mantener su estado de inscripción. Comprobantes de ciudadanía deben ser o un acta de nacimiento certificada, pasaporte certificado, o documentos de ciudadanía certificados. Si no presenta dicho comprobante de ciudadanía estadounidense dentro de un plazo de 30 días a partir de la fecha de este aviso, su inscripción electoral será cancelada.

Signature of Voter Registrar
Firma del Registrador de Votantes

Date
Fecha

The Court heard many assertions by the Secretary of State that recipients of the above could respond to cure the inquiry by various means of fax, email, regular mail, etc. Interestingly, the Secretary of State did not bother to include that information in the notice of examination.

The State of Texas



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David Whitley
Secretary of State

February 13, 2019

Dear [REDACTED]

Last week, I was deeply humbled to appear before the Texas Senate Committee on Nominations to discuss my qualifications to serve as Texas' 112th Secretary of State.

In succeeding all of the outstanding men and women who have served in this position, I have sought to demonstrate to all Texans that I am prepared to take on the responsibilities of the job.

The cornerstone upon which our nation is founded – the right to vote – must be supported by a strong foundation of laws, a code of ethics, and an assurance that everyone who participates in our democracy plays by the same rules.

The Secretary of State is required by law to ensure that voter rolls are accurate and do not include persons who are ineligible to vote while ensuring that all eligible voters can participate in the electoral process. The tasks are complementary: they promote integrity in elections and that, in turn, promotes voter turnout. Democracy in Texas will be strengthened and will endure by striving to achieve two goals: protecting the integrity of elections and combating voter suppression. I will never waver in my commitment to achieving those goals.

Regardless of whether voters were born in the United States or have dedicated themselves to become naturalized U.S. citizens, all eligible Texans deserve to have their voices heard in our democracy. I will faithfully and fully discharge my duty to ensure everyone who is qualified to vote has access to the ballot box.

As Secretary of State, it is my responsibility to ensure that no eligible voters are discouraged from exercising their most fundamental right.

Last month, my office announced the beginning of a list maintenance process, in accordance with state and federal law, to ensure the accuracy of our state's voter rolls. The purpose is to make sure that every single eligible voter has a voice at the ballot box, and that voters who have not attained citizenship do not register and cast ballots in Texas elections.

[REDACTED]
February 13, 2019

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From the beginning, my intent has been to promote maximum transparency to the public. Like any state agency, we are held accountable to the Texans we serve on a daily basis.

As Texas Secretary of State, I expect to be held accountable every day for my service to the voters of Texas.

After close consultation with the Texas Department of Public Safety (DPS), the counties, and members of the Texas Legislature, I have discovered that additional refining of the data my office provides to county voter registrars, both in substance and in timing, is necessary to ensure a more accurate and efficient list maintenance process.

My office devoted significant time and effort to educating local registrars about the upcoming list maintenance activity. In hindsight, however, before announcing the number of people who may not be eligible to vote, more time should have been devoted to additional communication with the counties and DPS to further eliminate anyone from our original list who is, in fact, eligible to vote. Moreover, the announcement could have been communicated better by including more substance from the election advisory, and by emphasizing my goal to ensure that no qualified voters are removed from the rolls. I recognize this caused some confusion about our intentions, which were at all times aimed at maintaining the accuracy and integrity of the voter rolls. To the extent my actions missed that mark, I apologize.

I want to personally commit to you and your constituents that I will do everything in my power as Texas Secretary of State to protect all eligible Texans' right to vote, and to provide regular and transparent updates on the progress of my office's ongoing list maintenance activities.

I am committed to serving honorably and working with you to help address the challenges of maintaining a free and fair electoral system. I hope to engage more Texans than ever before in the democratic process, and to continue protecting our most cherished right.

Sincerely,



David Whitley
Texas Secretary of State

HOME NEWS NEWS RELEASES

AG PAXTON: TEXAS SECRETARY OF STATE'S OFFICE DISCOVERS NEARLY 95,000 PEOPLE IDENTIFIED BY DPS AS NON-U.S. CITIZENS ARE REGISTERED TO VOTE IN TEXAS

January 25, 2019 | Voter Fraud

AG Paxton: Texas Secretary of State's Office Discovers Nearly 95,000 People Identified by DPS as Non-U.S. Citizens are Registered to Vote in Texas

Attorney General Ken Paxton today issued the following statement after the Secretary of State's office discovered that about 95,000 individuals identified by the Department of Public Safety as non-U.S. citizens have a matching voter registration record in Texas, and roughly 58,000 of them have voted in one or more Texas elections:

"Every single instance of illegal voting threatens democracy in our state and deprives individual Texans of their voice. We're honored to have partnered with the Texas Secretary of State's office in the past on voter initiatives and we will spare no effort in assisting with these troubling cases. My Election Fraud Unit stands ready to investigate and prosecute crimes against the democratic process when needed. We have obtained a number of successful non-citizen voter fraud convictions, including prison sentences for Rosa Ortega in Tarrant County and Laura Garza in Montgomery County. And earlier this month, investigators from our office arrested Marites Curry, a non-citizen charged with illegal voting in Navarro County. Nothing is more vital to preserving our Constitution than the integrity of our voting process, and my office will do everything within its abilities to solidify trust in every election in the state of Texas. I applaud Secretary of State Whitley for his proactive work in safeguarding our elections."

Texas law allows lawfully present noncitizens to obtain driver's licenses by showing proof of lawful presence to DPS. However, only citizens are eligible to vote. And Texas law currently does not require verification of a voter's statement that they are a citizen. The Texas Secretary of State provided the information to the Office of the Attorney General this week, which has concurrent jurisdiction to prosecute election crimes.

From 2005-2017, the attorney general's office prosecuted 97 defendants for numerous voter fraud violations. In 2018, Attorney General Paxton's Election Fraud Unit – with assistance from a criminal justice grant from the governor's office – prosecuted 33 defendants for a total of 97 election fraud violations. Last February, the attorney general announced a significant voter fraud initiative and addressed key problems and policy areas related to election law.

To view the Texas Secretary of State press release, click
here: <https://www.sos.state.tx.us/about/newsreleases/2019/012519.shtml>.